

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY)
AVERAGE WHOLESale PRICE)
LITIGATION)
_____)

THIS DOCUMENT RELATES TO:)

United States of America ex rel. Ven-a-Care of)
the Florida Keys, Inc. v. Abbott Laboratories,)
Inc., Civil Action No. 06-11337)

MDL No. 1456
Civil Action No. 01-12257-PBS
Subcategory No. 06-11337-PBS

United States of America ex rel. Ven-a-Care of)
the Florida Keys, Inc. v. Dey LP, et al., Civil)
Action No. 05-11084)

Hon. Patti B. Saris

United States of America ex rel. Ven-a-Care of)
the Florida Keys, Inc. v. Boehringer)
Ingelheim Corp., et al., Civil Action No. 07-)
10248-PBS)

Magistrate Judge Marianne B. Bowler

NOTICE OF THE UNITED STATES REGARDING PENDING DISCOVERY MOTIONS

In response to the Court's Order of August 5, 2009, Plaintiff, the United States of America, provides notice of the discovery motions that it wishes to be heard by Magistrate Judge Marianne B. Bowler on September 14, 2009. In addition, as explained below and in a motion that will be filed shortly, the United States requests that certain motions filed by defendants in conjunction with their summary judgment filings be heard by the District Court Judge as part of either the summary judgment hearing scheduled for October 20, 2009 (or a future date), or the hearing to be scheduled regarding the *Daubert* motion regarding the plaintiffs' damages expert.

Notice of Pending Discovery Motions By The United States

The United States notifies the Court that the following discovery motions filed by the United States against Defendants Boehringer Ingelheim Corporation ("BIC"), Boehringer Ingelheim Pharmaceuticals, Inc. ("BIPI"), Roxane Laboratories, Inc., and Roxane Laboratories,

Inc., n/k/a Boehringer Ingelheim Roxane, Inc. (collectively, “Roxane/BI”), are currently pending and should be heard:

United States’ Motion for Protective Order Regarding the Roxane Defendants’ Rule 30(b)(6) Notice and Memorandum of Law (Master Docket (“MD”) Nos. 5678 & 5679; Subdocket Nos. (“SD”) 68 & 69);

United States’ Motion to Compel Testimony via Rule 30(b)(6) Witness of Roxane and Memorandum of Law (MD Nos. 5898 & 5899; SD Nos. 178 & 179), only insofar as the motion seeks relief on the first and third issues identified in the motion; the United States hereby withdraws its motion on the second issue (which relates to questions asked about NovaPlus at Rule 30(b)(6) deposition) identified in the motion; and

United States’ Motion for Clarification of Order By Magistrate Judge Dated October 29, 2008 (MD No. 5672; SD Nos. 63).

The United States has not filed any discovery motions that are currently pending against Dey, Inc., Dey L.P., Inc., and Dey L.P. (collectively “Dey”), or Abbott Laboratories, Inc. (“Abbott”) at this time.

Statement Regarding Defendants’ Motions Filed In Conjunction With Summary Judgment Motions

On August 19, 2009, and August 20, 2009, Abbott, Dey and Roxane filed their notices concerning pending discovery motions (MD Nos. 6383, 6387, 6390; SD Nos. 367, 369, 372).

Among other motions, Abbott, Dey and Roxane listed the following as pending discovery motions:

Abbott Laboratories Inc.’s Motion For Sanctions and For A Finding Of Spoliation (MD Nos. 6096-97; SD Nos. 218-210);

Dey Inc.’s Motion For Sanctions And For A Finding Of Spoliation (MD Nos. 6109-10; SD Nos. 222 & 223);

Roxane Defendants’ Motion For Sanctions And For A Finding Of Spoliation (MD Nos. 6254-55; SD Nos. 274 & 275);

Roxane Defendants’ Expedited Motion For Leave To Depose Carolyn Helton

And Robin Kreush Stone (MD Nos. 6328-6330; SD Nos. 333 & 335); and,

Dey's Motion For Leave To Participate In The Depositions Of Carolyn Helton And Robin Kreush Stone (MD No. 6384; SD Nos. 368).

The first three of the above-listed motions, however, seek dispositive relief and are intertwined with defendants' summary judgment and *Daubert* motions. Notably, upon the filing of Abbott's and Roxane's spoliation motions, the District Court Judge requested the submission of courtesy copies to the Court, suggesting that the spoliation motions were contemplated as pending before the District Court Judge. The latter two motions were filed pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, and thus are directly related to the pending summary judgment motions.

The issues set forth in the defendants' spoliation briefs overlap with and are intertwined with issues raised by the defendants in their dispositive summary judgment memoranda, and also relate to the relief sought by Abbott in its *Daubert* challenge regarding the Plaintiffs' damages expert, Mark Duggan, Ph.D. A hearing on the parties' summary judgment motions and cross-motions is scheduled for October 20, 2009. The Court has not yet scheduled a hearing on the *Daubert* motion, and briefing on that motion will not conclude until November 16, 2009. (*See* Joint Motion for Entry of Additional Briefing Schedule, MD No. 6252; SD Nos. 273; 7/13/2009 Electronic Order granting Joint Motion). As to the additional depositions requested by defendants, the relief sought is primarily related to Roxane's motion for summary judgment and is properly considered in conjunction with the parties' summary judgment papers.

Given the nature of the relief sought by the defendants, and the interrelationship between the issues posed by these motions and those presented in the defendants' summary judgment and *Daubert* motions, the Government will shortly be moving to have these motions heard by the

District Court Judge either in conjunction with the summary judgment hearing or the later *Daubert* hearing.

Dated: August 21, 2009

Respectfully submitted,

For the United States of America,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused an electronic copy of the above NOTICE OF THE UNITED STATES REGARDING PENDING DISCOVERY MOTIONS to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

Dated: August 21, 2009

/s/ Ann M. St. Peter-Griffith
Ann M. St. Peter-Griffith